Supreme Court, U.S.
FILED
APR 11 2016
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No. 15-375

IN THE
Supreme Court of the United States

SUPAP KIRTSAENG DBA BLUECHRISTINE99,
Petitioner,

v.

JOHN WILEY & SONS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION[1]

Let's be clear what the Second Circuit's *Matthew Bender* standard is. *Matthew Bender* requires courts to assign "substantial weight" to a single factor, objective reasonableness. Whether to do so is not a case-by-case determination; failure to assign that weight in any case is an abuse of discretion. And once the district court finds that the losing party's claim is at least barely reasonable, it may not award fees unless it identifies other factors that "outweigh" the "substantial weight" *Matthew Bender* places on the other end of the scale. The Second Circuit invented that framework and is alone in applying it.

Our opening brief explains how the *Matthew Bender* standard is basically an exceptional case rule, limiting district court discretion to cases in which the loser deserves punishment. Wiley swears that it is not true—that even where the court considers the losing party to be blameless, it may award fees to the winning party. How many cases does Wiley cite proving it? Zero. We haven't found any either. Not once in 15 years of *Matthew Bender*.

If this rule were the law, § 505 would have no role in any serious copyright case. That makes no sense. Congress's goal was to modify the American Rule to encourage parties who ordinarily could not afford to bear their fees to assert or defend their rights. *Matthew Bender* destroys that promise, to the

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[1] This brief will abbreviate our Brief for Petitioner "OB," Wiley's Brief of Respondent "Resp.," and the Brief for the United States as Amicus Curiae "SG."

benefit of no one but wealthy litigants and trolls who use the massive cost of litigation as leverage. Nothing in the text or history of § 505 or the purposes of the Copyright Act contemplates that perverse result.

The proper standard grants district courts discretion to consider, and assign appropriate weight to, all relevant factors in evaluating whether the prevailing party's litigation has advanced the purposes of the Copyright Act. That, as this Court explained in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), is the litigation Congress wanted to encourage. The purposes-of-the-Act standard, developed in the Ninth Circuit in the 20 years since *Fogerty*, is not a rule of "jurisprudential importance"—as Wiley labels it—nor is it the British Rule. Wiley's rhetoric has no basis in the case law. Or, for that matter, our brief, which discusses the relevant incentives and factors at play in copyright litigation at length, and endorses a standard that weighs each one, case by case.

Wiley consumes pages trying to spin the district court's opinion in hopes of persuading this Court to review that opinion rather than the Second Circuit's. It also questions the reasonableness of the efforts of Kirtsaeng's lawyers to win the case, an obviously irrelevant question at this juncture. (We do note that Wiley does not reveal how much time its lawyers devoted to the case—only the flat, bargain-basement fee its law firm charged for the firm's own business reasons.) This case is about the standard announced in *Matthew Bender & Co. v. W. Publ'g Co.*, 246 F.3d 116 (2d Cir. 2011), that constrained both the district court and the court of appeals to deny Kirtsaeng every penny—including the $90,000 he paid to his law-

yer and the $26,000 he still owes. The district court, explicitly following *Matthew Bender*'s marching orders, gave controlling weight to the reasonableness of Wiley's losing claim and gave the back of its hand to Kirtsaeng's victory. That is the wrong approach. This Court should reverse.

ARGUMENT

I. The Second Circuit's One-Size-Fits-All Presumption Finds No Support In § 505's Text Or History, The Copyright Act's Purposes, Or The Case Law.

Everyone agrees that Congress's goal in modifying the American Rule was to encourage parties to litigate meritorious claims and defenses with a realistic prospect of a fee award when they win. *See* Resp. 46 (conceding "agreement"). Wiley tries on several theories of why Congress, despite declining to say so in the statutory text, would have pursued that goal by dictating that a losing party's "objectively reasonable" argument is always entitled to substantial weight. None persuades, at bottom because none can answer the *Matthew Bender* paradox: If Congress enacted § 505 to encourage important litigation, why would Congress have disabled § 505, in favor of the American Rule, in the very cases it hoped to encourage?

There is no puzzle here. Congress did not tacitly dictate enhanced weight for objective reasonableness over all other factors in § 505. The *Matthew Bender* standard is just another misguided experiment in judicial engineering, like the one this Court rejected

two terms ago in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014). It should scuttle this one too.

A. Wiley fails to reconcile the Second Circuit's presumption with the statutory text.

This section on statutory text can be brief, because Wiley's textual analysis is, well, nonexistent. Wiley offers no response to two key textual points:

First, Congress used the word "may" in § 505, and did not indicate in any way that it intended to promote a loser's reasonableness above other factors. *See* OB 19-20, 23.

Second, Wiley does not dispute that the *Matthew Bender* rule is nearly identical to the "exceptional case" standard, which also revolves largely around "the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." *Octane Fitness*, 134 S. Ct. at 1756. And Wiley fails to explain why a Congress that intended to elevate the same reasonableness principle would not have adopted some variation of the "exceptional case" standard that it had engrafted onto the Patent Act and Lanham Act. *See* OB 26-27

B. No settled practice trumps the statutory language.

In place of a textual argument, Wiley asserts that "[c]ourts have long given objective reasonableness substantial weight ... and Congress intended to continue that practice in Section 505." Resp. 24. But Wiley's sources do not support a settled practice elevating objective reasonableness over all other factors, much less congressional awareness of one.

1. This Court has been here before. In *Fogerty*, the copyright holder invoked the very same case Wiley invokes, *Lorillard v. Pons*, in support of the proposition that "Congress is presumed to be aware of a[] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Resp. 28 (citing *Lorillard*, 434 U.S. 575, 580 (1978)). This Court *rejected* the plaintiff's congressional ratification argument. *See Fogerty*, 510 U.S. at 527-32. So it is odd that Wiley would build its argument around an assertion that *Fogerty* "look[ed] to pre-1976 practice to determine the meaning of § 505 (citing *Lorillard*)." Resp. 28. Wiley travels the same doomed path, repackaging the same rejected evidence, to support its rule.

Case Law. Wiley says "examples are legion" of cases giving "substantial—indeed frequently dispositive—weight to the objective reasonableness of the losing party's position." Resp. 24-26 & n.3. Eight cases total—from only three circuits and one district

court—is hardly even a gaggle, much less a "legion."[2] And anyway. none of the cases states anything like the *Matthew Bender* rule. Four cases deny fees to prevailing defendants because the plaintiffs' positions were reasonable; two award fees to prevailing defendants because the plaintiffs' positions were unreasonable; and two award fees to prevailing plaintiffs because the defendants' positions were unreasonable. The four grants of fees are meaningless: Under any standard, an unreasonable argument will warrant a fee award. And all eight are nothing but particular instances of a court exercising its discretion to find objective reasonableness (or the absence of it) significant. Sure, that happened from time to time—as it would under the standard we propose. But that does not mean that courts adopted a hard-and-fast requirement applicable in all cases that this factor is assigned a specific weight.

Notably, Wiley's "legion" of eight is much slimmer than the losing showing that its counterpart made in *Fogerty* in defending the dual standard. The copyright owner there made the exact same argument and cited all Wiley's cases but one, plus 23 others. Brief for the Respondent, *Fogerty v. Fantasy, Inc.*, No. 92-1750, 1993 WL 434313, at *40-46 & n.34 (1993). This Court found this legion (four times the

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[2] Wiley cites old versions of *Nimmer on Copyright* purporting to identify a bright-line rule that fees are never awarded in close cases. But *Nimmer* cites just three cases, two already cited by Wiley. *See* Melville B. Nimmer, *Nimmer on Copyright* § 161 n.225 (1964); 2 Melville B. Nimmer, *Nimmer on Copyright* § 161 n.225 (1972). And Wiley offers no reason to believe Congress silently adopted whatever *Nimmer* says.

size of Wiley's) insufficient, simply because "not all courts expressly described the [plaintiff's] test in those terms." 510 U.S. at 531-32. Same here.

In any event, there are many more cases in which courts—including the very same courts Wiley invokes—awarded fees or denied them without mentioning objective reasonableness at all. *E.g.*, *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 667-68 (7th Cir. 1950); *Marks v. Leo Feist, Inc.*, 8 F.2d 460, 461 (2d Cir. 1925); *Edward B. Marks Music Corp. v. Foullon*, 171 F.2d 905, 908 (2d Cir. 1949); *N. Music Corp. v. King Record Distrib. Co.*, 105 F Supp. 393, 401 (S.D.N.Y. 1952); *Stonesifer v. Twentieth Century-Fox Film Corp.*, 48 F. Supp. 196, 200 (S.D. Cal. 1942); *Cory v. Physical Culture Hotel*, 14 F. Supp. 986, 986 (W.D.N.Y 1936); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930); *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 152 (S.D.N.Y. 1924); *F.A. Mills, Inc. v. Standard Music Roll Co.*, 223 F. 849, 853 (D.N.J. 1915).

Revision Studies. Wiley next turns (at 27-28) to two studies on copyright damages prepared for the Subcommittee on Patents, Trademarks, and Copyrights—the Strauss Study and its supplement, the Brown Study. William S. Strauss, *The Damage Provisions of the Copyright Law*, 86th Cong., 2d Sess. 1 (Comm. Print, Copyright Law Revision Study No. 22, 1960), *available at* http://www.copyright.gov/history/studies/study22.pdf; Ralph S. Brown, Jr., *The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study*, 86th Cong., 2d Sess. 59 (Comm. Print, Copyright Law Revision Study No. 23), *available at* http://www.copyright.gov/history/

studies/study23.pdf. This, too, is a page straight from the losing playbook in *Fogerty*. There, this Court rejected the studies, noting that they "deal only briefly with the provision for the award of attorney's fees," 510 U.S. at 528, and cite cases that "offer various reasons for awarding or not awarding attorney's fees to the prevailing party," *id.* at 529 n.14.

Wiley claims that the Strauss Study "confirms that the pre-1976 practice made objective reasonableness a key criterion" because the study says that the discretion to grant fees has been "'judiciously exercised.'" Resp. 28 n.4 (quoting Strauss Study at 31). That is obviously not the same. Wiley does not bridge the gap by noting that two of the cases the Strauss Study cites in footnote 243 weigh objective reasonableness heavily. Resp. 28 n.4 (citing Strauss Study at 31 n.243). The footnote contains *14* more cases that Wiley does not endorse.

The Brown Study, which was a "supplement to the Strauss Study," *Fogerty*, 510 U.S. at 530, does not help Wiley either. The single passage Wiley amplifies (at 27) is from a paragraph relating the "prevailing opinion among lawyers interviewed" for the study, Brown Study at 85—"about 25 lawyers experienced in copyright matters," *id.* at 64. As *Fogerty* noted (but Wiley omits), the Brown Study explicitly states that its "observations about attorney's fees are not intended as an exhaustive treatment of the subject." Brown Study at 85; *see Fogerty*, 510 U.S. at 531 n.15. The Brown Study also reports that "[t]he cases disclose a variety of miscellaneous reasons for denying fees." Brown Study at 85-86. And, Wiley fails to mention, the Brown Study lists fee provisions in oth-

er areas of law—including the Patent Act's "exceptional case" provision—and explains that "[t]he Copyright Act differs from all these neighboring fields in that the allowance ... is entirely a matter of judicial discretion." *Id.* at 84.

2. Wiley's ratification argument also fails because it ignores the most reliable evidence—evidence of what Congress actually did when it confronted a settled judicial interpretation in the patent context.

The fee provision in the 1946 Patent Act was identical to the one in the 1909 and 1976 Copyright Acts: A court "may in its discretion award reasonable attorney's fees to the prevailing party." Pub. L. No. 79-587, 60 Stat. 778. But when Congress revised the Patent Act in 1952, it added the proviso that a district court could award fees only in "exceptional cases." Pub. L. No. 82-593, 66 Stat. 792, 813. The Senate Report explained that the new provision was meant to "express[] the intention of the present [1946] statute as shown by its legislative history *and as interpreted by the courts*." S. Rep. No. 1979, 82d Cong., 2d Sess. 30 (1952) (emphasis added). In other words, when Congress concluded that the courts had adopted a uniform exceptional case standard, Congress was not content with tacit ratification. It revised the provision to make its prescription clear.

Wiley does not dispute that Congress was aware of the Patent Act's fee provision. After all, both the Strauss and Brown studies, which Wiley insists Congress read, specifically contrast that standard with the Copyright Act provision. Strauss Study at 31 n.243; Brown Study at 84. Congress was certainly

more aware of the Patent Act treatment than of dozens of reported cases scattered across the decades. Judging from Congress's past behavior, if it had believed that a rule like Wiley's was settled, it would not have been satisfied leaving the language as is and hoping that courts would read between the lines; it would have done what it did in the Patent Act revisions and made the standard explicit.

C. The Second Circuit's standard does not advance the Copyright Act's purposes.

Aside from the text of the rule, all agree that the next most important touchstone is the purposes of the Copyright Act. Wiley argues that elevating objective reasonableness over all other factors "perfectly tracks the guidance provided by *Fogerty*," Resp. 30, and "encourag[es] the litigation of close questions," Resp. 35. It is wrong.

1. Wiley starts by misreading several cues in *Fogerty*. It sees a big clue in footnote 19, noting that "of the four factors that this Court highlighted in *Fogerty* ..., two of them concerned the reasonableness of the losing party's position." Resp. 31. From that Wiley surmises that this Court intended to elevate that one concept over all others and assign it a predetermined weight in every case.

To the contrary, footnote 19 merely quotes several "nonexclusive factors" from one circuit case as an "example" of "factors that courts should consider." This Court did not "highlight"—much less "*twice* emphasize[]"—any particular factor. Resp. 31 (emphasis in original). The standard it quoted favors no

factor over any other, and this Court made clear that other factors would apply. 510 U.S. at 534 n.19. Anyway, the two factors Wiley emphasizes involve the *weakness* of a losing party's argument, its *un*reasonableness or frivolousness. Of course, the presence of those factors will often support an award. It does not follow that their absence weighs "substantially" against one.

Wiley also latches onto *Fogerty*'s quotation of the Brown Study discussed above (at 8-9). Resp. 32. But the Court was not endorsing the Brown Study's suggestion of a punishment-based standard; it was noting that the Brown Study did not speak in terms of a dual standard. 510 U.S. at 531. In the very next paragraph, the Court specifically *rejected* case law stating that fee awards are a "penalty" for an "unreasonable suit," calling that view "too narrow." *Fogerty*, 510 U.S. at 532 & n.18.

In fact, if the Court in *Fogerty* had considered objective reasonableness the most important factor, it would have come out the other way. The Ninth Circuit had affirmed denial of a fee award to the defendant on the ground that the plaintiff's claim was "not brought frivolously or in bad faith," 510 U.S. at 520. If this Court believed that was the correct rule, it would have affirmed, and maybe added the caveat that the same rule applies when plaintiffs win, too. That would have been the *Matthew Bender* rule. Instead the Court reversed, walking through the purposes of the Copyright Act, describing the ways in which litigation serves those purposes, and directing district courts to apply any relevant factor "in light of th[ose] considerations." *Id.* at 534.

2. Without text, history, or *Fogerty* on its side, Wiley looks for a "deeper connection" between the Second Circuit presumption and the purposes of the Copyright Act. Resp. 32. It maintains that the Second Circuit's rule "*encourages* litigation of the hard and close questions" and "appropriately *discourages* litigation of weak claims and defenses." Resp. 33 (emphasis in original). The second half we can ignore: All standards, including ours, discourage weak positions by shifting fees onto parties that maintain them. OB 48-49. It is the first half that matters, since *Fogerty* makes clear, as Wiley concedes (at 30), that Congress wanted to encourage meritorious claims and defenses alike. Here Wiley falls short.

The problem with Wiley's argument is that it zeroes in on just one possible dynamic: that "awarding fees to a prevailing party increases the risk associated with litigation, and thus chills litigation to the extent that a party's chance of prevailing is uncertain or doubtful." Resp. 33. Wiley's simplistic point is that a litigant in a close case will be to some extent deterred from litigating if there is a chance of losing and paying its opponent's fees. Resp. 34. Well sure, the risk of paying the other side's fees is part of any party's expected value calculus.

But so are other dynamics. There is also the countervailing chance of winning and *receiving* a fee award, which gives parties greater incentives to litigate. And then, of course, there is the risk of winning or losing the case and having to bear one's own fees, as under the American Rule, or a restrictive fee standard like Wiley's.

As *Fogerty* explained in detail, Congress cared at least as much about those incentives. It adopted § 505 because it wanted to encourage litigation that clarified the Act's contours, and that promoted creation and dissemination of creative works. OB 18-19. It was concerned that the cost of litigation was prohibitive for many parties who would advance such claims. So it enacted a provision that incentivizes those parties with the prospect of a fee award. Wiley has never suggested that Congress's purpose was anything else—in fact, it concedes it is "in agreement" with all of this. Resp. 46. So its argument, in essence, is that Congress modified the American Rule to encourage parties to litigate close cases, but disabled that very provision in all of those cases. That makes no sense.

One of Wiley's own citations proves its logical fallacy. Wiley cites an article by Judge Posner as support for its theory that awarding fees in close cases will inevitably chill litigation of close issues. Resp. 33 (citing Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 428 (1973)). So if Wiley's theory holds, we would expect Judge Posner to conclude that something like the Second Circuit rule would best encourage beneficial copyright litigation.

The reality is the opposite. In actual judicial opinions, Judge Posner has rebuked circuits that have adopted rules like Wiley's. *See Eagle Servs. Corp. v. H2O Indus. Servs., Inc.*, 532 F.3d 620, 624-25 (7th Cir. 2008). He has discussed several incentives that are quite different from the single one Wiley emphasizes. *See Assessment Techs. of WI, LLC*

v. WIREdata, Inc., 361 F.3d 434, 436-37 (7th Cir. 2004). With Judge Posner and Judge Easterbrook in the lead, the Seventh Circuit follows a generous fee shifting standard, not a crabbed and cautious one like Wiley's. *See id.*; *Riviera Distribs., Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008). Wiley has no claim to economic legitimacy.

Considering the full range of litigation dynamics, Wiley proposes a standard that does not encourage litigation that advances the Copyright Act's aims, but rather one that advances Wiley's own litigation agenda. A behemoth like Wiley can afford to pay its own fees. But what if you are a starving artist, a startup, or simply an individual who cannot afford tens or hundreds of thousands in counsel fees? *See* American Intellectual Property Law Association, *2015 Report of the Economic Survey* 39 (June 2015) (reporting median cost of a copyright suit at $250,000 for a case worth less than $1 million). Then you would not dare litigate against Wiley unless you have a decent chance of a fee award; without that prospect, even a win would leave you broke. In that circumstance, the American Rule yields the wrong incentives, namely immense pressure on smaller parties to capitulate and settle regardless of the merits. Great for Wiley. Bad for smaller litigants and the public.

Congress recognized that different cases present different litigation dynamics. That is why it conferred broad discretion. It makes no sense to adopt a rule that presumes that one incentive will always be the most salient. Congress would never have ap-

proved such artificial limitations on district court discretion.

3. Implicitly conceding this, Wiley pledges that the Second Circuit's standard does not pretermit district court discretion at all. Resp. 35-40. It insists that the Second Circuit has not fetishized objective reasonableness, claiming that "other factors can carry the day." Resp. 21.

Except that they never have. Not once. *Matthew Bender*'s suggestion that it is an abstract possibility, 240 F.3d at 122, is meaningless if it is not borne out in practice. In practice, in the 15-year history of the *Matthew Bender* standard, district courts in the Second Circuit have decided scores of fee applications under § 505. Not one has ever found that other factors carry the day.[3]

4. Finally, Wiley cites a series of cases about other statutes—with other purposes—insisting that their holdings support its proposed rule "given ... the prominence of the reasonableness inquiry in other fee award contexts." Resp. 31 n.5. But those cases undermine Wiley's position.

Two of the cases applied statutes that expressly incorporated a reasonableness inquiry in the statu-

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[3] Wiley cites (at 40 n.9) one gotcha counterexample. But the exception proves the rule. The case merely confirms that sometimes even more culpable (and independently sanctionable) behavior like "bad faith" tactics will justify an award even where a position itself is objectively reasonable. *See Viva Video, Inc. v. Cabrera*, 9 F. App'x 77, 80 (2d Cir. 2001). That hardly proves that *Matthew Bender* is a "flexible standard." Resp. 38.

tory text. *See Cloer v. Sec'y of H.H.S.*, 675 F.3d 1358, 1360 (Fed. Cir. 2012) (quoting 42 U.S.C. § 300aa-15's "good faith" and "reasonable basis" requirements); *Griffon v. U.S. Dep't of H.H.S.*, 832 F.2d 51, 53 (5th Cir. 1987) (quoting 28 U.S.C. § 2412's "substantially justified" limitation). Congress made a different choice in § 505.

A third case notes that "whether the Government had a reasonable basis for withholding requested information" is among the "criteria" relevant to the award of fees under the Freedom of Information Act. *See Burka v. U.S. Dep't of H.H.S.*, 142 F.3d 1286, 1288 (D.C. Cir. 1998). Right—*one* criterion, in a list of others, including, for example, "the public benefit derived from the case." *Id.* at 1288. That looks much more like our proposed standard than Wiley's.

Finally, Wiley cites *Martin v. Franklin Capital Corp.*, which announces a rule for removal cases that permits the award of fees "only where the removing party lacked an objectively reasonable basis for seeking removal." 546 U.S. 132, 141 (2005). As we explained in our opening brief (at § II.D), this rule is tied directly to the purposes of the removal statute, which differ greatly from the purposes of the Copyright Act. Wiley offers no response. (The Government suggests that both statutes have the same purpose. SG 20-21. But it buries the obvious difference in a footnote: The removal statute authorizes fees only against a defendant who has improperly removed. SG 21 n.6. So it is unconcerned with encouraging anything, nor indeed with any of the incentives on the plaintiffs' side of the v.)

D. The Second Circuit's presumption dramatically favors plaintiffs over the run of cases.

Wiley does not dispute that copyright scholars believe that the Second Circuit's punishment-based standard is just the dual standard in disguise. OB § II.B. It just ignores the common wisdom and insists—without providing evidence of its own—that our "evenhandedness criticism is ... wrong." Resp. 43. The proof is in the pudding.

In our opening brief, we cited an article and survey documenting that, across the country, plaintiffs receive fees 89% of the time while defendants receive fees only 61% of the time, and specifically attributing the disparity to fee standards founded in the culpability (or not) of the losing party's claim. OB 29 (citing Jeffrey Edward Barnes, Comment, *Attorney's Fee Awards in Federal Copyright Litigation After* Fogerty v. Fantasy, 47 UCLA L. Rev. 1381, 1383 (2000)). Wiley does not dispute these numbers.

Instead, Wiley takes us to task for not citing a line in that article stating that the numbers for defendants were up to 80% in the Second Circuit in the five years after *Fogerty*. Resp. 44. But Wiley fails to mention that those five years were pre-*Matthew Bender*! That sheds no light on how courts behave under *Matthew Bender*.

Wiley was free to present statistics for the 15 years since *Matthew Bender*. If it had examined the 178 cases, they would have disclosed that accused infringers who prevailed and sought fees have received

them 45% of the time. Prevailing copyright holders: 86%. (Should the Court request, we will submit a digest of the survey data.) The numbers speak for themselves. Wiley's surmise, based on two cases, that "weak defenses are more common than weak claims" because of the "Internet," Resp. 45-46, does not come close to explaining away the disparity.

E. Wiley's dressed-up summary of the district court opinion does not save the Second Circuit's standard.

Wiley insists that the district court here considered and balanced all the relevant factors. Resp. 40-42. Wiley does not deny that the court applied the *Matthew Bender* standard in full force. Instead, it insinuates that the scale was not somehow tilted by the Second Circuit's heavy thumb. But application of an incorrect legal standard is an abuse of discretion, and the influence of the *Matthew Bender* standard is plain from the face of the district court's opinion.

Wiley maligns our contention that the district court "devoted less than a sentence to Kirtsaeng's substantive positions, the result he obtained, the victory's wide-ranging impact, and the financial imbalance he confronted," OB 3, as "simply false," Resp. 3. But it is plainly true. When it came to actually applying the test, the district court's discussion of these factors combined was limited to the statement that "[w]hile ...this litigation clarified the boundaries of copyright law, this result is due as much to Wiley's risk in bringing the claim as to Kirtsaeng's successful defense." Pet. App. 18a. It dismissed factors going to "the degree of success obtained" and the "financial

disparity between the parties" as "consideration[s] more relevant to determining the magnitude of an award once it has been resolved that such an award is appropriate." *Id.* at 23a (quotation marks omitted). This despite *Fogerty*'s admonition that courts should consider any relevant factor that is "faithful to the purposes of the Copyright Act," 510 U.S. at 534 n.19.

Meanwhile, the pages Wiley cites as dealing with "considerations other than objective reasonableness" reveal a slanted and incomplete analysis, the kind one would expect only when the conclusion leads the way. For example, Wiley, echoing the district court, says that high litigation costs are irrelevant to Kirtsaeng because Orrick represented him pro bono before this Court. Resp. 41 (quoting Pet. App. 19a). That, of course, ignores all of the litigation that took place before the Supreme Court stage, when Kirtsaeng paid counsel to press on despite a series of defeats. In any event, Wiley conceded that Orrick's pro bono representation is irrelevant, *see* Cert. Reply at 11, and the Second Circuit went out of its way to reject the notion that pro bono representation weighs against a fee award as "counter to *Fogerty*," Pet. App. 5a n.2.

Wiley also argues that Kirtsaeng "had a powerful financial incentive to litigate" because victory would allow him to continue to import textbooks into the United States and sell them. Resp. 41 (quoting Pet. App. 20a). As Wiley knows, Kirtsaeng did win, and he is now a teacher in Thailand. Pet. App. 34a. Neither Wiley nor the district court supported the notion with evidence of how valuable this "powerful financial incentive" was. In any event, the district

court did not even adopt Wiley's argument that Kirtsaeng faced no risk, perhaps because Kirtsaeng faced a $600,000 judgment, accompanied by an order confiscating his computer, printer, and golf clubs, JA 8. These stakes would be low risk for Wiley, but for a grad student this is quite the setback.

Speaking of Wiley, where is discussion of its risks and incentives? The district court apparently found that Kirtsaeng's clarification of copyright law owed as much to Wiley's brave decision to soldier on as to Kirtsaeng's decisions, but it did not actually analyze Wiley's side of things. What if, say, Wiley was on a several-years-long campaign to establish this point of law? OB 6. What does Wiley's size and litigation warchest suggest about *its* ability to bear fees? What did Wiley have to gain by prevailing? Noting those incentives is not, as Wiley protests, "accusing [it] of acting improperly by seeking to protect its intellectual property." Resp. 41 n.10. It is just considering both sides' risks and incentives, an essential inquiry if a court's decision depends on the sort of two-to-tango reasoning the district court employed here.

But the district court never conducted the inquiry—it assumed the conclusion.

II. The Purposes-Of-The-Act Standard Best Serves The Act's Large Objectives.

Wiley's short critique of the standard we propose—the Ninth and Eleventh Circuit's purposes-of-the-Act framework—begins with spin. Wiley says that standard "would displace a factor—objective

reasonableness—that has been at the heart of the copyright fee award analysis for more than a century with a newly-fashioned factor—'jurisprudential importance.'" Resp. 22. All wrong. The purposes-of-the-Act standard does not displace anything; objective reasonableness is a factor under that standard, OB 48-49, and Wiley concedes that the cases applying the standard reflect this, Resp. 49. Meanwhile, the only thing "newly fashioned" about considering the extent to which a substantive result furthers the purposes of the Copyright Act is Wiley's own overcooked label—"jurisprudential importance." Consideration of whether a result advances the Act's aims comes straight from *Fogerty* and was applied by the Ninth Circuit on remand from that case (which Wiley ignores). OB 45-46.

Congress adopted § 505 to give district courts the discretion to award fees that encourage beneficial litigation. A flexible, multi-factored test aimed directly at that target best honors that intent.

A. Wiley's critique of the purposes-of-the-Act standard rests on the same misunderstanding of congressional intent and litigation incentives.

Wiley's principal argument to the contrary is based on the same simplistic syllogism deployed in defense of its own rule: Litigation of close cases is good; the prospect of paying the other side's fees is a disincentive to litigate those cases; so fees should never be awarded in a close case. Resp. 47-48; *see* Resp. 33-34. And the response is the same: Wiley is fixating on one side of the equation, without consid-

ering the other. This syllogism is at least as apt: Litigation of close cases is good; the prospect of receiving a fee award is an incentive to litigate such cases; so fees should always be awarded in a close case. Considered in a vacuum, they are equally plausible.

So which of the two is correct? Well neither, of course, because each ignores other case-specific variables informing the parties' risk calculus. That is why any standard must permit district courts to consider all relevant factors without predetermined weights. OB 30-33, 48-50; *supra* 12-15.

But what if we ask a different question: Which of the two—avoiding disincentives (Wiley's view) or providing incentives (ours)—did *Congress* care about when it enacted § 505? As we have explained (at 13), the answer there is obvious: plainly the latter. If Congress wanted to encourage litigation that furthers the purposes of the Act, and it agreed with Wiley that not shifting fees in close cases was the best way to encourage parties to litigate those cases, it would have just left the American Rule intact and never enacted § 505 at all. So Wiley's syllogism cannot possibly be the answer.

The proper standard focuses on whether the result the prevailing party achieved is the sort that advances the purposes of the Copyright Act, and then considers whether the incentives for that party are such that a fee award will meaningfully encourage such beneficial litigation.

B. The purposes-of-the-Act standard is not the British rule, nor is it difficult to apply.

Wiley lobs in two additional critiques—both flawed.

First, Wiley claims that the purposes-of-the-Act standard "while not fully replicating the British Rule, goes much of the way there." Resp. 51. Referring to the discussion in our brief sketching the extent to which certain types of copyright victories might advance the Act's purposes, Wiley depicts the purposes-of-the-Act standard as leading to denial of fees only "where a losing party makes an objectively reasonable argument in a case of 'localized significance' or concerning a technical issue of 'copyright formalities.'" Resp. 51 (quoting OB 49).

That is another straw man. The purposes-of-the-Act standard, as we explained, "leaves the district court in a particular case free to decide the extent to which a particular result" advances the Act's purposes. OB 41. "There is no per se rule, presumption, or one-size-fits-all prescription." OB 41. Wiley offers no evidence that the purposes-of-the-Act rule has functioned like the British Rule in the Ninth or Eleventh Circuits. It almost certainly would not, since so many copyright cases *do* involve the run-of-the-m'll application of established law to facts.

Second, Wiley maintains that district courts are incapable of assessing whether a substantive result advances the purposes of the Copyright Act. Resp. 52-54. Courts consider the impact of their rulings all

the time in making fee determinations. Under Title VII, for example, "the most critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). Under FOIA, as noted above (at 16), courts consider "the public benefit derived from the case." And, of course, we cited several examples of courts making determinations as to whether a result advances the purposes of the Copyright Act. OB 41, 45, 48.

Contrary to Wiley's assertion, district courts are perfectly capable of figuring out whether a case "'settle[s] a substantive legal issue with broad applicability.'" Resp. 53 (quoting OB 15). That is the core of our proposal, not whether a case will "eventually reach this Court," Resp. 54, and not whether it will have "'seismic significance for a particular industry,'" Resp. 53 (quoting OB 15). In any event, there is no need for concern that district courts cannot "predict the likelihood" of these outcomes. Resp. 53. District courts typically defer fee applications until appeals have run their course, as the court did here, since it rarely makes sense to resolve a fee application before it is clear which party has prevailed.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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Date: April 11, 2016